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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 27

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC., AND MONTGOMERY WARD & CO., INCORPORATED,
Respondents.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,
Respondent.

RESPONDENTS' BRIEF.

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RESPONDENTS' BRIEF.

QUESTIONS PRESENTED FOR REVIEW.

Respondents conceive the questions presented for review to be as follows:

1. Whether the Court of Appeals had power to issue the writ of mandamus to petitioner to compel revocation of orders of reference entered in violation of rule 53(b).

2. Whether this is an appropriate case for the exercise of that power.

3. Whether petitioner's reference of two non-jury cases for the reason that petitioner was "confronted with an extremely congested calendar" and found "that exceptional conditions exist for this reason" violated rule 53(b).

STATEMENT OF THE CASE.

Petitioner on his own motion, over the objection of the parties, referred two separate non-jury cases to a master for trial. The cases were not consolidated for trial. At most, *Rohlfing* and *Shaffer* are "companion" cases. And, this is true only to the extent that they both relate to the shoe finding industry and there are three parties common to both cases.

The orders of reference were substantially identical. The only showing made by the orders of reference was:

> "The Court, being confronted with an extremely congested calendar, and finding that exceptional conditions exist for this reason, * * *."

ARGUMENT.

I.

The Court of Appeals Had Power to Mandamus Petitioner to Revoke References Made in Violation of Rule 53(b).

Petitioner's brief denies that the Court of Appeals had power to mandamus petitioner to revoke the references made in violation of rule 53(b).

However, the power is clearly conferred by the statute, enacted in 1948, which grants to all federal courts alike the power to issue all writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 62 Stats. Part 1, 944, 28 U. S. C. § 1651(a).

Even the dissenting judge below agreed that the Court of Appeals had "jurisdiction and power to issue the writ." (R. 325.)

The First Circuit, in *In re Narragansett Pier Amusement Corp.*, 224 F. 2d 231 (CA 1, 1955), did not doubt its power to issue the writ, but merely held there were no "exceptional circumstances" present in that case which would "necessitate or render it appropriate" to exercise the power.

Petitioner's brief asserts that prior to 1948, the pertinent statutes conferred on this Court a power broader than that vested in the courts of appeals with respect to the issuance of mandamus to a district court. (pp. 29-31.) To support this contention, petitioner contrasts the language of former section 342, granting the Supreme Court power to issue writs of mandamus "in cases warranted by

the principles and usages of law", with that of former section 377, granting power to federal courts to issue the writ where it "may be necessary to exercise their respective jurisdictions, and agreeable to the usages and principles of law".

However, this Court has defined its power under section 342 as identical with that of the courts of appeals under section 377 in cases where the writ was directed to a district court. See *Ex parte Republic of Peru*, 318 U. S. 578, 582 (1943), where this Court described its own power as follows: "Hence its statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only in so far as such writs are in aid of its appellate jurisdiction." And, see *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943), where this Court described the power of the courts of appeals in the same manner:

> "As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction."

Obviously the present statute, 28 U. S. C. § 1651(a), enacted in 1948, did not change the law. It simply codified the language previously used by this Court to define its power and that of the courts of appeals to issue mandamus directed to a district court.

Therefore, the issuance of the writ by this Court in *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940) is compelling authority for the proposition that the Court of Appeals had power to grant mandamus to revoke references made in violation of rule 53(b).

The point is made that the traditional office of mandamus is "to confine an inferior court to a lawful exer-

cise its authority when it is its duty to do so". (Petitioner's brief, p. 34.) But, this Court has pointed to *McCullough* as an instance of that traditional use. *Ex Parte Republic of Peru*, 318 U. S. 578, 583 (1943). Therefore, the Court of Appeals' grant of the writ in the case at bar—where the relief was identical with that in *McCullough*—was necessarily an instance of traditional use of mandamus. Furthermore, the Court of Appeals' direction that the cases referred by petitioner be tried by a judge, rather than a master, is also essentially the same as this Court's mandate to a district court to try at law a count which it had transferred to the equity side, which transfer was characterized by this Court as a repudiation of jurisdiction. *Ex parte Simons*, 247 U. S. 231 (1918).

It is argued that the Court of Appeals has unlawfully reviewed an interlocutory order prior to appeal from a final judgment. (Petitioner's brief, pp. 31, 33.) This assertion ignores the fact that there is no remedy for these unlawful orders of reference on appeal from a final judgment.

For example, in *Adventures In Good Eating* v. *Best Places To Eat*, 131 F. 2d 809 (CA 7, 1942), on appeal from the trial court's final decree, the court affirmed despite its holding that the reference violated the rule. The court did no more than tax the costs of reference to the plaintiff (which won the case) because it had sought the reference over defendant's objection. But in the case at bar, all parties objected to the references. See also: *Prudence-Bonds Corp.* v. *Prudence Realization Corp.*, 174 F. 2d 288 (CA 2, 1949); *Newman & Bisco* v. *Realty Associates Securities Corp.*, 173 F. 2d 609 (CA 2, 1949); and 5 Moore, Federal Practice, 2d ed., 2946-2948 (1951), where the author states that an order of reference made in viola-

as the means of such review. And, there is nothing in *In re Narragansett Pier Amusement Corp.*, 224 F. 2d 231 (CA 1, 1955), to support petitioner's assertion that the First Circuit refused mandamus in that case because "it could review the entire case after final decree." (Petitioner's brief, p. 32.)

In *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943), *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 (1953), and *Parr* v. *United States*, ... U. S. ....., 76 Sup. Ct. 912 (1956), this Court was careful to point out that the party seeking the writ had a remedy on appeal from a final judgment. See also: *Ex Parte Fahey*, 332 U. S. 258 (1947), to the same effect and *Roberts* v. *District Court*, 339 U. S. 844 (1950), where another remedy was available.

On the other hand, where the action of the lower court was not reviewable, the writ issued. *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940); *United States* v. *Smith*, 331 U. S. 469 (1947); *Maryland* v. *Soper*, 270 U. S. 9 (1926); *Ex Parte United States*, 287 U. S. 241 (1932); *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212 (1945).

The fact remains that this Court, with the same statutory power as a court of appeals, has issued mandamus to compel observance of rule 53(b) of the Federal Rules of Civil Procedure and rule 33 of the Federal Rules of Criminal Procedure. *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940); *United States* v. *Smith*, 331 U. S. 469 (1947).

II.

This Was an Appropriate Case for the Court of Appeals to Exercise Its Power to Mandamus.

A review of the circumstances demonstrates that this was an appropriate case for the Court of Appeals in its sound discretion to exercise its power to mandamus.

Here, the Court of Appeals found, not that petitioner had erred, as the Court of Appeals found the district judge had done in *Evaporated Milk Assn.* v. *Roche*, 130 F. 2d 843 (CA 9, 1942), but that petitioner's action constituted an "abuse of discretion". (R. 318.)

The Court of Appeals issued the writ "in aid of" its appellate jurisdiction, just as this court must have done in *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940). In this connection, see *Krinsley* v. *United Artists Corp.*, 225 F. 2d 579 (1955), 235 F. 2d 253 (CA 7, 1956), where a reference made two appeals necessary and where, on the second appeal, the Court of Appeals said (p. 257):

> "Had the trial judge himself heard the evidence and then made the same findings and reached the same conclusions, this case could be disposed of here in a very short opinion."

A circumstance of great importance is the fact that references, rather than being the exception, are "a practice all too common in the Northern District of Illinois", as the Court of Appeals observed in *Krinsley*, 235 F. 2d 253, 257 (CA 7, 1956).

Furthermore, this is a case where there is no remedy by appeal. It is not a case of substituting mandamus for appeal.

This is not the sort of case in which this Court should interfere with the Court of Appeals' exercise of its sound

III:

The References Violated Rule 53(b) of the Federal Rules of Civil Procedure.

Rule 53(b) directs that "reference to a master shall be the exception and not the rule." Petitioner's simultaneous reference of two different cases might, of itself, raise some question of compliance with this basic principle.

In *Los Angeles Brush Mfg. Co.* v. *James*, 272 U. S. 701 (1927), this Court advised the federal judiciary in certain terms that equity rule 59, the forerunner of 53(b), was meant to be observed.

This warning was implemented forcefully with respect to rule 53(b), by this Court's disposition of *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940).

The trial judges in the Seventh Circuit were admonished further by their Court of Appeals to obey the rule. *In re Irving-Austin Bldg. Corp.*, 100 F. 2d 574 (CCA. 7, 1938), and *Adventures In Good Eating* v. *Best Places To Eat*, 131 F. 2d 809 (CCA 7, 1942).

Against this backdrop, petitioner made the two references in issue here.

Rohlfing and *Shaffer* are non-jury cases. Such cases can be referred "only upon a showing that some exceptional condition requires" the reference.

Petitioner referred these cases because he was "confronted with an extremely congested calendar." He found that "exceptional conditions exist for this reason." (R. 4, 213.)

Although there may have been a time when a congested calendar was an exceptional, temporary thing, congestion is probably the most serious problem confronting bench and bar today. Certainly it is not an exceptional condition

so far as petitioner is concerned. He admits that his calendar was congested for several years before he referred *Rohlfing* and *Shaffer*. (R. 12.) Of course, his individual calendar is not the sole criterion. As the respondents requested, the Court of Appeals directed that the cases be tried by the District Court, not necessarily by the petitioner. Petitioner did not show in the order of reference, or in his pleadings, that no other judge was available to try these cases. In fact, the Court of Appeals said that "the possibility and advisability of asking that these cases be reassigned to a different judge for trial might well be explored." (R. 324.)

The responsible recommendations of bench and bar reject references as a cure for congestion. Judicial Conference Report, 13 F. R. D. 62, 83, Report of Committee on Practice and Procedure in the Trial of Antitrust Cases, Antitrust Section, American Bar Association, 1954, p. 12. If one were to adopt the principle that congestion is ground for references, then trial judges would be free to refer case after case until the condition is alleviated.

The authorities hold that congestion is not an exceptional condition which requires a reference. *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940); *United States* v. *Kirkpatrick*, 186 F. 2d 393 (CA 3, 1951); *Hartford-Empire Co.* v. *Shawkee Mfg. Co.*, 5 F. R. D. 46 (W. D. Pa. 1946). See also Barron & Holtzoff, Federal Practice and Procedure, Rules Edition, Vol. 2, Sec. 1163, p. 872.

In *McCullough*, the only case decided by this Court interpreting rule 53(b), the writ issued despite the showing that the calendar was congested and despite the additional showing that the assigned judge was ill, no other judge was available, all parties desired an early trial, the cases had been pending for a long time and the cases were complicated and would require a protracted trial. 3 Fed.

Rules Serv. 496. Thus, the showing in that case was far more compelling than that made by petitioner.

Petitioner attempts to distinguish *McCullough* on the ground that when it was decided, this Court possessed a separate, broader power to issue mandamus to a district court. As demonstrated above (pages 3, 4), this argument is without foundation.

Petitioner would confine the authority of *McCullough* to a situation where the judges of a given district engage in a persistent disregard of the rule. But there is nothing in this Court's opinion in *McCullough* to justify such a limitation. This Court must have been of the opinion that the three cases referred in *McCullough* should not have been referred on the showing made. Otherwise, it would not have revoked the reference. In other words, persistent or not, the reference was a disregard of the rule.

If persistent disregard of the rule is necessary to explain *McCullough*, it can be found in the simultaneous reference of three patent cases, just as it can be found in the case at bar in the simultaneous reference of two different anti-trust cases.

If it can be argued that *McCullough* can be explained only by the fact that the district judges there were, aside from that particular case, persistently disregarding the rule, that element is also present in the case at bar, as is evidenced by the remarks of the Chief Judge in *Krinsley* to the effect that references are "a practice all too common in the Northern District of Illinois." In other words, if the Chief Judge is to be believed, then references are not the exception in that district.

Persistent disregard of the rule is more likely the explanation for this Court's having entertained the original application in *McCullough* than it is the explanation for the decision on the merits of that case. This would be consistent with this Court's reasoning in *Ex parte Republic of Peru*,

318 U. S. 578, 584 (1943); *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 705 (1927); *Ex parte United States*, 287 U. S. 241, 248-249 (1932), where it was said:

> "The rule deducible from the later decisions, and which we now affirm, is that this Court has full power in its discretion to issue the writ of mandamus to a federal District Court, * * * but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this court as the court of ultimate review only in such exceptional cases."

Petitioner argues that *Rohlfing* and *Shaffer* are very complex cases. However, although the rule provides for reference of jury cases where the issues are complicated, it makes no reference to complexity as a basis for reference of a non-jury case. We do not assume that petitioner means that because the cases are complex, a master is better qualified to try them. Apparently, petitioner is simply saying that if he tries these cases in their proper turn, those which follow on his trial call will proceed at a later date. However, when a case comes on for trial in due course, the litigants have a right to expect that their case will be tried by the court within a reasonable time. They have awaited their turn and the mere fact that there may be many cases to follow, is no reason to refer their case to a master.

Petitioner points out that there will be considerable post-trial work; but, of course, that work will have to be done even if the cases are tried by a master and, in all probability, petitioner will be better able to perform that task if he tries the cases himself and becomes familiar with them first hand.

Petitioner's portrayal of the *Rohlfing* and *Shaffer* cases is based principally on the *ex parte* allegations of the unverified complaints,—a wholly unreliable criterion of the true nature of the cases. Judicial Conference Report, 13 F. R. D. 62, 66. He concedes that "many of the claims will be either wholly unsupported by evidence, or on the other hand conceded." (Petitioner's brief p. 27.) He refers to the volume of pre-trial discovery which is certainly not a reliable indication of what evidence will be offered at the trial, since rule 26(b) expressly permits discovery of matter conceded to be inadmissible. Finally, he refers to a brief submitted several years ago in one of the referred cases (*Rohlfing*), dealing with the original complaint, when there were five times as many defendants in that case as there are now.

The fact is that petitioner did not resort to any of the available, recommended procedural devices to ascertain the true nature of these cases and to simplify them if circumstances warranted. Judicial Conference Report, 13 F. R. D. 62. He did not conduct a pre-trial conference in either case. He did not order a separate trial of separable issues, such as conspiracy. When he denied motions for partial summary judgment, he did not make an order "specifying the facts that appear without substantial controversy," although requested to do so. Rule 56(d).

Petitioner could have learned that the passage of time has served to eliminate any unusual complexity there may have been in these cases and that today they are fairly representative of the numerous private antitrust actions pending in the federal courts.

In *Rohlfing* there are now five defendants. Two of these are leather manufacturers. One is a finder or wholesaler who went out of business in September 1950. One is a retail mail order house and the remaining defendant is a retail department store chain.

The case is pending on the second amended complaint, which charges price discrimination and conspiracy to restrain and monopolize. It does not charge violation of Section 3 of Robinson-Patman. (R. 59.)

Petitioner argues that the price discrimination charges will require the hearing of 558 separate controversies. (Petitioner's Brief, p. 9.) However, the two manufacturer-defendants in *Rohlfing* did not sell to any of the plaintiffs, as was noted by petitioner in his memorandum of January 29, 1954, denying their motions for partial summary judgment, when he said, "* * * it appears that none of the moving defendant-manufacturers sold any shoe supplies to any of the plaintiffs". The two defendant retailers are alleged to be preferred buyers, not sellers. The remaining defendant who went out of business in September 1950, answered that he sold to only two plaintiffs. (R. 131.)

Shaffer was always a much simpler case than *Rohlfing*. Here again, the six remaining plaintiffs, all wholesalers, charge price discrimination and conspiracy, but not violation of Section 3 of Robinson-Patman. (R. 241.)

The thirty-two defendants have dwindled to five. Two of these are leather manufacturers. One manufactures shoe polish. One is a shoe repair shop chain and the other is a wholesaler who went out of business in September 1950. (R. 131.)

In connection with the price discrimination aspects of the case, it should be noted that the original complaint, which was verified, alleged the dollar purchases by each plaintiff from the various defendants during the period 1945-1949. From these tables, it appears that during the actionable period one defendant-manufacturer sold five of the present plaintiffs, while the other two defendant-manufacturers sold only one each. Of course, the repair chain and the wholesaler-defendant made no sales to any of the plaintiff wholesalers.

In re Narragansett Pier Amusement Corp., 224 F. 2d 231 (CA 1, 1955), is not, in fact, in conflict with the ruling of the Court of Appeals in this case. There the trial judge had referred eight jury cases which had been consolidated for trial. Those cases involved charges of fraudulent reporting of film rentals and counter-charges of antitrust violations concerning four theatres and covering periods ranging up to 17 years. Understandably, the trial court found in his order of reference that the issues were complicated,—the prerequisite for reference of jury cases.

Petitioner cites, at pages 22 and 23 of his brief, a number of cases decided prior to 1932, in support of his argument that congestion of the trial calendar is an exceptional condition requiring a reference. These cases do not establish that congestion is an exceptional condition in the Northern District of Illinois today.

In *Berlin* v. *Evans*, 300 Fed. 677 (D. C. E. D. Pa., 1924); *Holt Mfg. Co.* v. *C. L. Best Gas Turbine Co.*, 245 Fed. 354 (D. C. N. D. Calif., 1917); *Flanders* v. *Coleman*, 249 Fed. 757 (D. C. S. D. Ga., 1918); *Bliss* v. *Anaconda Copper Mining Co.*, 167 Fed. 342 (C. C. D. Mont., 1909); and *Ramsay* v. *Home Mortgage Co.*, 47 F. 2d 621 (D. C. E. D. N. C., 1931), district judges passed upon the propriety of their own references. In *Berlin* the master's report was attacked on the ground the reference was improper. In *Flanders* and *Ramsey* the parties waived their objections to the references. *Bliss* was decided even before equity rule 59 was adopted.

Smith v. *Brown*, 3 F. 2d 926 (CCA 5, 1925), was pure dictum since the parties had not preserved the point in the trial court. *The P. R. R. No. 35*, 48 F. 2d 122 (CCA 2, 1931), concerned Admiralty Rules 43 and 46, and as stated in *United States* v. *Kirkpatrick*, 186 F. 2d 393, 396 (CA 3, 1951), "* * * the adoption by the Supreme Court of

Admiralty Rule 43½ on May 31, 1932, 286 U. S. 572, a little more than a year after the decision in *The P. R., R. No. 35,* eliminated the basis for the decision in that case and * * * it is, therefore, no longer authority for the practice which it approved.''.

Petitioner cites only two cases in support of the references which were decided after this Court's mandate in *McCullough* v. *Cosgrave,* 309 U. S. 634 (1940). Neither of those cases involved references based on congestion of the trial calendar. *Helene Curtis* v. *Sales Affiliates,* 105 F. Supp. 886 (S. D. N. Y., 1952), held that a reference was required because an entire industry was disrupted and postponement of trial would seriously aggravate business losses or infringement damages. *Troyak* v. *Enos,* 204 F. 2d 536 (CA 7, 1953), the other post-*McCullough* case cited by petitioner, presented an exceptional condition in that the trial judge had retired and was sitting by assignment until a successor could be appointed. In addition, the case required that hearings be held at various places throughout the United States.

Petitioner's brief argues that the Court of Appeals has virtually nullified references. This ascribes too much to the Court's holding. References are proper in jury actions when the issues are complicated and in non-jury cases on matters of account or when there is an exceptional condition which requires a reference, such as existed, for example, in *Helene Curtis* and *Troyak.* Of course, many cases are referred by agreement of, or without objection from the parties. All the Court of Appeals has done is require petitioner to conform to the requirements of the rule.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

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